Supreme Court of the United States.

No. 343.—October Term, 1904.

Joseph Ralph Burton, Plaintiff in Error, *vs.* The United States. } In error to the District Court of the United States for the Eastern District of Missouri.

[January 16, 1905.]

The plaintiff in error having been convicted in the District Court of the United States for the Eastern District of Missouri of a violation of the Revised Statutes of the United States, sec. 1782, (1st U. S. Comp. Stat., p. 1212,) and set forth in the margin,* has brought the case here directly from that court by writ of error.

The defendant was a member of the Senate of the United States, representing the State of Kansas. The indictment under which he was tried contained nine counts. The first count, after averring that the defendant was a Senator from the State of Kansas, averred that on the 26th day of March, 1903, he received at St. Louis, Missouri, from the Rialto Grain and Securities Company $500 in money, as compensation for his services theretofore on November 22, 1902, and on divers other days between that day and the 26th day of March, 1903, rendered for the company before the Post Office Department of the United States, in a certain matter then and there pending before that department, in which the United States was directly interested, that is to say: Whether the company had violated the provisions of section 5480 of the Revised Statutes of the United States, in that the company had through its officers devised a scheme and artifice to defraud, which was to be effected through correspondence by means of the post office estab-

*1 U. S. Comp. Stat. 1212.

Sec. 1782. No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States.

lishment of the United States, and whether the correspondence of the company at St. Louis, Mo., should not be returned with the word "Fraudulent" plainly written or stamped upon the outside, as authorized by law. It is also averred that the services rendered by defendant to the company consisted in part of visits to the Postmaster General, the chief inspector, and other officers of the Post Office Department, and of statements made to the Postmaster General, the chief inspector, and other officers, which visits and statements made by the defendant were made with a view and for the purpose of inducing the Postmaster General, the chief inspector, and other officers to decide the question then pending before the Post Office Department in a way favorable to the Rialto Company. The second count of the indictment was the same as the first, except that it averred the United States was "indirectly," instead of "directly," interested in the question as to whether or not a "fraud" order should be issued. Upon the third count the jury rendered a verdict of not guilty. Upon the fourth and fifth counts the Government entered a *nolle prosequi.* The third, fourth and fifth counts concededly charged but one offence, which was the same as that charged in the first and second counts, and all of these counts were based upon the payment of $500 in cash to defendant at St. Louis on the 26th of March, 1903. The sixth count averred the receipt by defendant at the city of St. Louis, in the State of Missouri, of a check for the payment of $500, which was received by the defendant on the 22d of November, 1902, the check being drawn upon the Commonwealth Trust Company of St. Louis, payable to the order of the defendant and by him duly endorsed, and such check was paid by the Trust Company to defendant at St. Louis, as compensation for his services to the company between the 22d of November, 1902, and the 26th of March, 1903, before the Post Office Department, in a matter in which the United States was directly interested. The count then contained the same averments of the character of the question pending before the Post Office Department as are set forth in the first count. The seventh count is the same as the sixth, except that it averred the making of a check and the payment thereof to the defendant on the 15th day of December, 1902, at the city of St. Louis, in the State of Missouri, for the sum of $500; all other averments being the same as the sixth count. The eighth count averred the giving of a check for the sum of $500 on the 22d day of January, 1903, at the city of St. Louis, in the State of Missouri, in payment of services of the same nature as stated in the sixth and seventh counts. The ninth count is the same as the sixth, seventh and eighth, except that it averred the receipt of a check by the defendant, dated the 16th day of February, 1903, at the city of St. Louis, in the State of Missouri, for the same class of services and upon the same matter then pending before the Post Office Department. The defendant demurred to the indictment on the ground that it stated no crime, and that it showed that the

United States had no interest, direct or indirect, in the matter before the Post Office Department, inasmuch as the interest of the United States, under the statute, must be either a pecuniary or property interest, which may be favorably or unfavorably affected by action sought or taken in the given matter pending before the department. The demurrer was overruled, and the defendant then pleaded not guilty.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

Counsel for defendant base their right to obtain a direct review by this court of the judgment of conviction in the District Court of Missouri upon the contention that the case involves the construction and application of the Constitution of the United States in several particulars. They insist that under article 3, section 2, of the Constitution, and also under the Sixth Amendment of the same, the defendant was entitled to be tried by a jury of the State or district in which the crime alleged against him in the indictment was committed. This question arises by reason of those counts of the indictment which charge the receipt by defendant of various checks therein set forth, at St. Louis, in the State of Missouri, while the evidence in the case shows, without contradiction, that the checks were received in the city of Washington, D. C., and payment thereof made to defendant by one of the banks of that city. Counsel contended that if any crime were committed by the receipt of these checks and the payment thereof to the defendant, (which is denied,) that crime was committed in Washington and not in Missouri, and that it did not come within section 731 of the Revised Statutes of the United States, providing that when an offence against the United States is begun in one judicial circuit and completed in another it shall be deemed to have been committed in either, and may be dealt with, etc., in either district, in the same manner as if it had been actually and wholly committed therein. Counsel for defendant also contend that the case involves the construction and application of section 6 of article 1 of the Constitution of the United States, providing that Senators and Representatives shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses and in going to and returning from the same. These questions were raised in the court below. Whether the defendant waived his alleged privilege of freedom from arrest as Senator would probably depend upon the question whether the offense charged was in substance a felony, and if so, was that privilege a personal one only, and not given for the purpose of always securing the representation of a State in the Senate of the United States. However that may be, the question is not frivolous, and in such case the statute grants to this court jurisdiction to issue the writ of error directly to the District Court, and then to decide

the case without being restricted to the constitutional question. (*Horner v. United States*, No 2, 143 U. S. 570.) It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. Having jurisdiction to decide all questions in the case on this writ of error, we deny the motion for a certiorari, and proceed to an examination of the record.

First. The question of the construction of the statute upon which this indictment was framed is the first to arise. Upon that question a majority of the court (Mr. Justice Harlan, Mr. Justice Brown, Mr. Justice McKenna, Mr. Justice Holmes and Mr. Justice Day concurring) are of opinion that the facts alleged in the indictment show a case that is covered by the provisions of the statute, while the Chief Justice, Mr. Justice Brewer, Mr. Justice White and the writer of this opinion dissent from that view, and are of opinion that the statute does not cover the case as alleged in the indictment.

Second. Assuming that the statute applies to the facts stated in the indictment, a further question arises upon the general merits of the case, whether there was sufficient evidence of guilt to be submitted to the jury, and a majority of the court (the same Justices concurring) are of opinion that there was, or are not prepared to say there was not, and the same minority dissent from that view and are of opinion that there was no evidence whatever upon which to found a verdict of conviction.

There are, however, other questions remaining, which we now proceed to discuss on the theory that the statute covers the case.

Third. The sixth, seventh, eighth and ninth counts of the indictment aver the receipt by the defendant of the different checks described, at the city of St. Louis, in the State of Missouri, and the payment of the money thereon to the defendant at St. Louis, in that State, as compensation for services theretofore performed by the defendant for the Rialto Company. It may be assumed that on the facts averred in these various counts in the indictment upon the checks, each of them was good. It turned out, however, on the trial that these averments of the place where the different checks were received and paid were not true; but, on the contrary, the evidence was wholly undisputed that each of them was received by the defendant in the city of Washington, D. C., and by him there endorsed and deposited with the Riggs National Bank of Washington, D. C., and that they were afterwards duly paid by the Commonwealth Trust Company at St. Louis, Missouri; that the amount of each was in each instance immediately credited by the Riggs National Bank to the account of the defendant with the bank, and the cashier testified that the defendant had the right, immediately after the credit was made, to draw out the whole, or any portion thereof, without waiting for the payment of the check at St. Louis.

There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, endorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the Trust Company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of the bank when a check was not paid, or charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the endorser of the check, and nothing more. There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated. The forwarding of the check "for collection," as stated by Mr. Brice, was not a collection for defendant by the bank as his agent. It was sent forward to be paid, and the Riggs Bank was its owner when sent. With reference to the jurisdiction of the court over the offence described in the sixth and following counts in the indictment, the court held that if the checks were actually received by the defendant in Washington and the money paid to him by the bank in that city, and the title and ownership of the checks passed to the bank at that time, the court in Missouri had no jurisdiction to try the offences set forth in those counts of the indictment already referred to. There was no question that such was the fact, and it was error to submit the matter to the jury to find some other fact not supported by any evidence. The court said:

"The Government claims that the compensation referred to in this count was sent to the accused by the Rialto Grain and Securities Company, in the form of a check, drawn by it on the Commonwealth Trust Company, payable to the order of the accused, by mail; that he received the check representing this compensation at Washington, in the District of Columbia, and then and there endorsed the check, deposited it to his own credit in the Riggs National Bank at Washington; that the last

mentioned bank afterwards forwarded the check by and through its correspondents to St. Louis for payment by the Commonwealth Trust Company, upon which it was drawn, and that the Riggs Bank and its correspondents in all this matter became and were the agents of the accused for securing this money, and when the money called for by the check was finally paid at St. Louis, Missouri, by the Trust Company, on which it was drawn, it amounted to a payment of that money to the accused at St. Louis, Missouri. This suggests an important feature of the case, for the reason that unless it be true that the accused received the money represented by and paid on this check at St. Louis, this court would have no jurisdiction to try the case."

"The Constitution of the United States confers upon the accused in every criminal case the right to be tried by an impartial jury of a State and district where the crime shall have been committed.

"The receipt of the money is the gist of the crime charged against the accused, and if he did not receive it in this district, in fact in St. Louis, where he is charged to have received it, he is not amenable to the law in this district, and cannot be convicted in this court on this sixth count. Accordingly, it becomes your duty to ascertain and find from the evidence what were the true relations between the accused and the Washington bank, when he deposited the check in question with that bank, and what was the understanding between them as to their respective rights in relation to the check and the proceeds thereof. On this question the court charges you as follows:

"If it was the intent and understanding of the Washington bank and the accused at the time the latter deposited the check in question with the former, that the bank should forward the same in the usual course by and through its correspondents to St. Louis, for payment, and that in so doing it and its correspondents should act only as the agent of the accused for that purpose, then the final payment by the Commonwealth Trust Company at St. Louis, of the check to the correspondents of the Washington bank, would amount in law to a payment in St. Louis as charged in the sixth count, of the amount of the check to the accused. If on the contrary it was the understanding and intent of the Washington bank and the accused at the time the latter deposited the check in question with the former that the bank should become the purchaser of the check, and should thereafter be the absolute owner thereof, and not act as just indicated, as the agent of the accused in the collection of the check, then the payment at St. Louis by the Commonwealth Trust Company would amount in law to a payment to the Washington bank and not to the accused. In the latter event no crime would have been committed by the accused in this district, by reason of the check referred to in the sixth count of the indictment.

"In order to find the accused guilty on the sixth count, you must find from the evidence, by the same measure of proof as is required in all criminal cases, that the check referred to in the sixth count was deposited by the accused in the Washington bank for collection, and that the bank was to act in collecting the same, as the agent of the accused, and not as the owner of the check in question.

"In determining this issue, you are at liberty to and should consider all the evidence adduced; the actual transaction as it occurred at the Riggs Bank where the check was deposited, the check itself and all its endorse-

ments, the rights and privileges which were immediately accorded the accused upon making the deposit, the actual conduct and purpose of the Riggs Bank in forwarding the check to St. Louis for payment, the customary conduct and usage of that bank, and all banks in Washington at the time so far as shown by the proof. And if from all these facts and all other facts disclosed by the proof you find that the check in question was in fact deposited by the accused, with the intent and knowledge on his part, as well as on the part of the bank itself, that it should be forwarded to St. Louis for collection for account of the accused, the bank and its correspondents acting as agents for the accused to make such collection, you should find that when the same was actually paid to the last endorser on the check at St. Louis by the Trust Company upon which it was drawn, it was in contemplation of law paid to the accused himself.

"If on the contrary you find from the evidence that the accused and the Riggs Bank, at the time of the deposit of the check in question, understood and intended that the bank should become the purchaser of the check and be its absolute owner, then the subsequent forwarding of it to St. Louis for payment was the act of the bank itself, and the final payment of the check by the Trust Company at St. Louis was a payment not to the accused, but to the bank, and if such is the fact your verdict on the sixth count must be not guilty."

A careful scrutiny of the evidence with relation to this charge to the jury shows that there was no foundation for submitting to the jury the question of what was the understanding (other than such as arose from the transaction itself, as shown by uncontradicted evidence) between the defendant and the bank at the time when these various checks were deposited with the bank and their proceeds placed to the credit of the defendant. There was no agreement or understanding of any kind other than such as the law makes from the transaction detailed, which was itself proved by uncontradicted evidence offered by the Government itself. In the absence of any special agreement that the effect of the transaction shall be otherwise (and none can be asserted here,) there is no doubt that its legal effect is a change of ownership of the paper, and that the subsequent action of the bank in taking steps to obtain payment for itself of the paper which it had purchased can in no sense be said to be the action of an agent for its principal, but the act of an owner in regard to its own property. The learned judge in his charge to the jury did not, indeed, deny the general truth of this proposition, but he left it to the jury to determine whether there was not an agreement or understanding made or arrived at by the parties at the time the checks were taken by the defendant to the bank, which altered the legal effect of the transaction actually proved. This, as we have said, there was not the slightest evidence of, and it was error to submit that question to the jury.

The general transactions between the bank and a customer in the way of deposits to a customer's credit and drawing against the account by the customer constitute the relation of creditor and debtor. As is said by Mr.

Justice Davis, in delivering the opinion of the court in *Bank of the Republic* v. *Millard*, (10 Wall. 152,) in speaking of this relationship (page 155:)

"It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst and Campbell in the House of Lords in the case of *Foley* v. *Hill*, (2 Clark & Finnelly, 28,) and they all concurred in the opinion that the relation between a banker and a customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authorities is to the same effect."

When a check is taken to a bank, and the bank receives it and places the amount to the credit of a customer, the relation of creditor and debtor between them subsists, and it is not that of principal and agent. This principle is held in *Thompson* v. *Riggs*, (5 Wall. 663,) and also in *Marine Bank* v. *The Fulton Bank*, (2 Wall. 252.) See also *Scammon* v. *Kimball*, (92 U. S. 362, 369;) *Davis* v. *Elmira Bank*, (161 Id. 275, 288.)

The case of *Cragie* v. *Hadley*, (99 N. Y. 131,) contains a statement of the rule as follows, per Andrews, Chief Judge:

"The general doctrine that upon a deposit made by a customer, in a bank, in the ordinary course of business, of money, or of drafts or checks received and credited as money, the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question. (*Commercial Bank of Albany* v. *Hughes*, 17 Wend. 94; *Metropolitan Nat. Bank* v. *Loyd*, 90 N. Y. 530.) The transaction in legal effect is a transfer of the money, or drafts or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts or checks on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business."

In *Metropolitan Nat. Bank* v. *Loyd*, (90 N. Y. 530,) one of the cases referred to by Judge Andrews, Judge Danforth, in speaking of the effect of placing a check to the credit of a depositor in his account with the bank, said that—

"The title passed to the bank, and they (the checks) were not again subject to his control. See *Scott* v. *Ocean Bank in City of New York*, (23 N. Y. 289, and other cases cited in the opinion.)

* * * * * *

"It is true no express agreement was made transferring the check for so much money, but it was delivered to the bank and accepted by it, and

the bank gave Murray credit for the amount, and he accepted it. That was enough. The property in the check passed from Murray and vested in the bank. He was entitled to draw the money so credited to him, for as to it the relation of debtor and creditor was formed, and the right of Murray to command payment at once was of the very nature and essence of the transaction. On the other hand, the bank, as owner of the check, could confer a perfect title upon its transferee, and, therefore, when by its directions the plaintiff received and gave credit for it upon account, it became its owner and entitled to the money which it represented. . . . If, as the appellant insists, the check had been deposited for a specific purpose—for collection, the property would have remained in the depositor, but there is no evidence upon which such fact could be established, nor is it consistent with the dealings between the parties, or with any of the admitted circumstances.

"These show that it was the intention of both parties to make the transfer of the check absolute, and not merely to enable the bank to receive the money upon it as Murray's agent."

The same principle is set forth in *Taft* v. *Bank*, (172 Mass. 363.) In that case the court said: "So when, without more, a bank receives upon deposit a check endorsed without restriction and gives credit for it to the depositor as cash in a drawing account, the form of the transaction is consistent with and indicates a sale, in which, as with money so deposited, the check becomes the absolute property of the banker."

In the case at bar the proof was not disputed. The checks were passed to the credit of defendant unconditionally, and without any special understanding. The custom of the bank to forward such checks for collection is a plain custom to forward for collection for itself. The only liability of defendant was on his endorsement. All this made a payment at Washington, and as a result there was a total lack of evidence to sustain the sixth, seventh, eighth and ninth counts of the indictment. The court should have, therefore, directed a verdict of not guilty on those counts.

This is not a case of the commencement of a crime in one district and its completion in another, so that under the statute the court in either district has jurisdiction. (R. S. sec. 731; 1 Comp. Stat. p. 585.) There was no beginning of the offence in Missouri. The payment of the money was in Washington, and there was no commencement of that offence when the officer of the Rialto Company sent the checks from St. Louis to defendant. The latter did not thereby begin an offence in Missouri.

Fourth. The judgment must also be reversed because of the error in the refusal of the court to charge as requested when the jury came into court and announced an inability to agree. Previous to the retirement of the jury the defendant's counsel submitted to the court certain requests to charge the jury, twelve in all. Those numbered seven, ten and eleven were refused. Numbers ten and eleven referred to the checks and the effect of the transaction of depositing them with the Riggs Bank. The other intsructions referred to many of the questions arising in the case, and

material upon the subject of the trial then before the court. After the court had concluded his main charge to the jury he added that he had been "asked by counsel for the defendant to give certain declarations here, and while I think they have, in the main, been covered by the charge, yet I will give them to you." (They were the instructions requested by defendant and above described.) "These are abstract propositions of law, which I give in connection with the charge, as perhaps more fully amplifying it. I am willing to give them, inasmuch as they are asked, and they contain general propositions of law." The jury then retired, and after being out from Saturday evening at 8 o'clock until the following Monday morning at 10 o'clock without agreeing, returned into court and were charged by the court in relation to their duty as jurors. In the course of that charge the court said to the jury as follows:

"I gather from this letter, Mr. Foreman, what I may be incorrect about. I would like to ask the foreman of the jury how you are divided. I do not want to know how many stand for conviction, or how many for acquittal, but to know the number who stand the one way and the number who stand another way. I would like the statement from the foreman.

"The FOREMAN: Eleven to one.

"The COURT: The jury stand eleven to one. I gather that from the communication. In the light of that fact I feel constrained to make a statement to you, and in making it to use the language of the Supreme Court of the United States as found in *Allen* v. *United States.*" (164 U. S. 492.)

The court then charged the jury in relation to its duty to agree if possible, and directed that the jury should, in the light of the comments of the court then made, retire and make a serious attempt to arrive at a verdict in the case. Counsel for the defendant then asked the court to indicate to the jury that the requests to charge theretofore, asked by the defendant and which were given by the court, constitute as much a part—

"The COURT: If you will wait a moment the jury may retire.

"Mr. KRUM: I beg your Honor to state to the jury——

"The COURT: Stop a moment and then I will hear your argument. I will, after the jury retire, hear counsel if they have anything to say, or any exceptions they may wish to take to the charge. The court here handed the foreman of the jury the charge and instructions heretofore referred to and directed the jury to retire for further consideration of their verdict.

"Mr. LEHMAN: I do not believe that the requests to charge in the manner made by defendant and given by the court to the jury, were given as they should have been, the suggestions being made by the court at the time, that they were mere abstract statements, which had the effect to deprive them of something of their force, when they were not intended as mere abstractions and were believed by counsel to have specific reference to the case; and those instructions as well as others ought to be called to the attention of the jury. We must except here as earnestly as it is in our power to do, against the charge of the court made now.

"The COURT: If you except, I will allow the exception.

"Mr KRUM: What I desire to do in the presence of the jury was to ask your Honor to indicate to the jury, as it was evident the jury did not understand, that it was a fact that the requests to charge which were recognized by the court, acquiesced in by the court and given by the court, were just as much a part of your Honor's charge as that which the court read as emanating from the court itself.

"The COURT: I did tell the jury so on Saturday.

"Mr. KRUM: I submit it is apparent that they do not understand that they are just as much to be controlled by that part of the instructions as any other part. That is evident from the inquiry made.

"The COURT: The court has endeavored to answer the only request made by the jury, and that is all I think should be done."

We think the court should have instructed the jury as requested by counsel for the defendant, and that its refusal to do so was error. Here was a case of very great doubt in the minds of some of the jury. It had deliberated for more than thirty-six hours and been unable to agree upon a verdict. The requests to charge originally made by counsel for defendant had at that time been received as abstract propositions of law, which the court gave in connection with the charge, saying that he was willing to give them inasmuch as they were asked, and as they contained general propositions of law. It does not appear from the bill of exceptions that defendant's counsel then excepted to those remarks by the court, but when the jury subsequently returned into court and announced their inability to agree, counsel for defendant immediately saw the extreme importance of having the requests to charge made to the court regarded by the jury, not as abstract or general propositions of law, but as requests which affected the case then on trial with reference to the facts proved in the case; and so, before the jury again retired, they commenced to propound their requests upon the subject to the court, but the court before listening to them instructed the jury to retire, and then followed the colloquy above set forth between court and counsel.

Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. Considering the attitude of the case as it existed when the jury returned into court for further instructions, we think the defendant was entitled, as matter of legal right, to the charge asked for in regard to the previous requests to charge, which had been granted by the court under the circumstances stated, and it was not a matter of discretion whether the jury should, or should not, be charged as to the character of those requests. A slight thing may have turned the balance against the accused under the circumstances shown by the record, and he ought not to have longer remained burdened with the characterization of his requests to charge, made by the

court, and when he asked for the assertion by the court of the materiality and validity of those requests which had already been made, the court ought to have granted the request.

We must say in addition, that a practice ought not to grow up of inquiring of a jury, when brought into court because unable to agree, how the jury is divided; not meaning by such question, how many stand for conviction or how many stand for acquittal, but meaning the proportion of the division, not which way the division may be. Such a practice is not to be commended, because we cannot see how it may be material for the court to understand the proportion of division of opinion among the jury. All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge. Cases may easily be imagined where a practice of this kind might lead to improper influences, and for this reason it ought not to obtain.

Our conclusion is, that the judgment must be reversed and the cause remanded to the District Court of Missouri with directions to grant a new trial.

So ordered.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

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[January 16th 1905.]

Mr. Justice Harlan, dissenting.

I dissent from so much of the opinion and judgment as holds that the offences charged against the defendant, based on the checks made at St, Louis and mentioned in the sixth, seventh, eighth and ninth counts, were committed in this District, where the checks were received by him, and not at St. Louis, where they were paid by the bank on which they were drawn for his benefit. I am of opinion that the Riggs National Bank, upon receiving the checks from the accused, became, in every substantial sense, his agent and representative to present the checks and receive the proceeds thereof; in which case, the offence of receiving, by means of those checks, compensation for services rendered in violation of the statute was committed at St. Louis, not at Washington. In a strict sense, no title or ownership of the checks passed to the Riggs National Bank, as in the case of an unconditional sale, consummated by actual delivery, of tangible, personal property for the recovery of the possession of which the owner could, of right, maintain an action in his own name; for, if the St. Louis bank on which the checks were drawn had refused to accept or honor them, no action on the checks, or at all, could have been maintained against it by the Riggs National Bank. *Bank of Republic* v. *Millard*, 10 *Wall.* 152, 156; *First National Bank* v. *Whitman*, 94 *U. S.* 343, 344; *St. Louis &c.* v. *Railway*, 133 *U. S.* 566, 574; *Fourth Street Bank* v. *Yardley*, 165 *U. S.* 634, 643. The checks were made at St. Louis and sent by mail from that city to the accused in discharge of an obligation assumed by his client at that city, and, as between him and his client, in the absence of any special agreement on the subject, compensation for services rendered by him before the Department could only be deemed to have been really made when the checks were paid by the bank on which they were directly drawn. It is true that when the Riggs National Bank received the checks and credited the account of the accused on its books with the amount thereof, there arose, as between that bank and him, only the relation of debtor and creditor. But when his account at that

bank was so credited, he became liable, by implied contract—if the St. Louis bank failed to accept or pay the check when presented—to pay back to the bank an amount equal to the credit he received on the books of the Riggs National Bank. If the St. Louis bank had refused to accept or pay the checks when presented, and if the accused had then sued his client on its original contract with him, the latter could not have resisted recovery upon the ground that he received compensation by having his account at the Washington bank credited with the amount of the checks. Suppose the accused had been indicted in Washington on the day after the checks were endorsed to the Riggs National Bank, and the checks were not honored or paid when presented at the St. Louis bank, could he in that case have been convicted under the statute by proof that he received such credit at the former bank for the amount of the checks? Clearly not. Yet he could have been, if it be true that he was compensated, within the meaning of the statute, when his account with the Riggs National Bank was credited with the amount of the checks. As between the accused and his client, he was not, in any true sense, compensated for the services alleged to have been rendered in violation of the statute, until by payment of the checks by the St. Louis bank he was relieved of all liability to the Riggs National Bank arising from his endorsing the checks to it. The accused is to be regarded as having received, at St. Louis, compensation for his services, because the check made in his behalf was paid there to his representative. The offence was, therefore, consummated at that city, and the Federal court at St. Louis had jurisdiction.

Nor, in my opinion, does the record show any error, in respect of instructions that were to the substantial prejudice of the accused; no error for which the judgment should be reversed.

It seems to me that in reversing the judgment upon the grounds stated in the opinion the court has sacrificed substance to mere form. The result, I submit, well illustrates the familiar maxim: *Qui haeret in litera haeret in cortice.*

True copy.

Test:

Clerk Supreme Court, U. S.